IN THE SUPREME COURT
OF THE STATE OF NEVADA

TEMORA TRADING COMPANY, LTD.,
a purported trust,

Appellant,

vs.

WALLACE PERRY, as Trustee of
the Estate of Boyd James
O'Donnell and Joan O'Donnell,
Bankrupts,

Respondent.

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No. 13531

F I L E D
MAY 27 1982
C.R. DAVENPORT
Clerk of Supreme Court
By /s/Judith Fountain
Deputy Clerk

Appeal from order striking defendant's answer, entering a default judgment, and awarding summary judgment. Fourth Judicial District Court, Elko County; Joseph O. McDaniel, Judge.

Affirmed.

Wilson, Wilson and Barrows, Ltd.,
Las Vegas;
Moneymaker & Morrison,
Los Angeles, California,
for Appellant.

Goicoechea, DiGrazia & Marvel,
Elko; Russell Piccoli,
Phoenix Arizona,
for Respondent.

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## O P I N I O N

PER CURIAM:

Respondent Wallace Perry, as Trustee of the Estate of Boyd James O'Donnell and Joan O'Donnell, Bankrupts, commenced this action in the district court to quiet title to certain property located in Elko County.

The District judge, after finding that appellant-defendant Temora Trading Company, Ltd. had willfully failed to comply with the court's discovery orders, struck Temora's answer. NRCP

37(b). Summary judgment was entered in favor of the Trustee. This appeal followed:

## THE FACTS

O'Donnell filed for bankruptcy in Arizona. Respondent Perry was named trustee in the bankruptcy proceedings. Although O'Donnell was adjudicated bankrupt, he was denied a bankruptcy discharge. Just prior to filing his petition for bankruptcy, O'Donnell transferred valuable real estate holdings to a James Gleason, who allegedly transferred the property to Temora.

Discovery was protracted and bitterly fought. Eventually, Perry noticed the depositions of three of Temora's officers in the Bahamas. At the time set

for their depositions their local attorney appeared and stated that they would not be deposed without an order from a Bahamian court. Perry obtained an order from the district court in Elko compelling Temora to produce its officers. The order was served on Temora's counsel in Elko. The officers still refused to comply.

Thereafter, the district court struck Temora's answer and entered a default judgment against Temora. Temora argues that the district court abused its discretion by granting a default judgment as a sanction for failure to honor the court's orders. Temora also suggests that Perry's complaint fails to state a cause of action because it appears on the face of the complaint that the cause is barred by the statute of limitations.

We reject Temora's contentions and we affirm the default judgment.

THE DEFAULT JUDGMENT

NRCP 37(b) empowers the district court with a broad range of sanctions that may be invoked when parties fail to comply with discovery orders. The court may strike all or part of a party's pleadings, and enter a default judgment.

The sanction of dismissal or default may be imposed only in cases of willful noncompliance of the court's orders. **Finkelman v. Clover Jewelers Boulevard, Inc.**, 91 Nev. 146, 532 P.2d 608 (1975). The district judge in the instant case found that Temora's failure to comply was willful. That finding is supported by substantial evidence, including Temora's history of obstructing discovery, as well as the failure of

Temora's officers to appear for their depositions. 1/

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1/ Temora was not responsive to certain interrogatories. In response to interrogatories 8 and 9, counsel for Temora, Mr. Moneymaker, stated that "James Gleason -- address unknown" formed Temora and contributed all its property. The Nassau attorney who formed Temora, Mr. Ralph Seligman, in his deposition testified to the contrary:

MR. MONEYMAKER: All right. Now I take it -- has Mr. Gleason or Temora Trading Company waived the attorney-client privilege of confidentiality imposed upon you under Bahamian law?

THE WITNESS: There is no attorney-client privilege between myself and Temora. As far as Mr. Gleason is concerned, I am satisfied the gentleman does not exist.

MR. MONEYMAKER: All right. I take it, what you are telling me is that James Gleason, to your knowledge, has not waived the privilege?

THE WITNESS: Mr. James Gleason, to my knowledge, does not exist, and therefore there is no privilege to waive.

MR. MONEYMAKER: I take it --

THE WITNESS: I am satisfied that I was duped as an instrument of fraud, and this is the reason I have sworn my affidavit.

In **Skeen v. Valley Bank of Nevada**, 89 Nev. 301, 511 P.2d 1053 (1973), this court held:

> "Default judgments will be upheld where the normal adversary process has been halted due to an unresponsive party, because diligent parties are entitled to be protected against interminable delay and uncertainty as to their legal rights. 89 Nev. at 303; 511 P.2d at 1054.

## THE STATUTE OF LIMITATIONS

Temora argues that even if the district court did not err in striking its answer, it was error to grant a default judgment. Temora's contention is that Perry's complaint failed to state a cause of action because it did not plead facts showing that the statute of limitations was tolled. See **Kellar v. Snowden**, 87 Nev. 488, 489 P.2d 90 (1971);

**Bank of Nevada v. Friedman**, 82 Nev. 417, 420 P.2d 1 (1966).

However, Perry alleged in his complaint that Gleason was a fictitious person. When the answer was stricken, all of Perry's allegations were taken as true. A transfer of property to a fictitious person is a complete nullity, transferring no title. An action to avoid such a transfer is not subject to the statute of limitations. **Gayle v. Jones**, 63 F.Supp. 481 (W.D. La. 1945); **Houghton v. Houghton**, 116 So. 493 (La. 1928).

## RES JUDICATA

Finally, Temora suggests that Perry's complaint is barred by the doctrines of res judicata and collateral estoppel. These were affirmative defenses included

in Temora's answer. The defenses were stricken with the answer.

The judgment is affirmed.

/s/Gunderson, C.J.
GUNDERSON

/s/Manoukian, J.
MANOUKIAN

/s/Springer, J.
SPRINGER

/s/Mowbray, J.
MOWBRAY

/s/Steffen, J.
STEFFEN

Attest: A full, true and Correct Copy.
C.R. Davenport, Clerk of the Supreme Court
By/s/Judith Fountain Deputy.

IN THE SUPREME COURT
OF THE STATE OF NEVADA

TEMORA TRADING COMPANY, LTD., ANTHONY F. BOWE, and ELIZABETH A. SMITH,

Petitioners,

vs.

THE HONORABLE JOSEPH O. McDANIEL, District Judge in the Fourth Judicial District Court of the State of Nevada, in and for the County of Elko,

Respondent.

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No. 13991

F I L E D:
June 23, 1982
C. R. Davenport
Clerk of Supreme Court
By /s/Judith Fountain
Deputy Clerk

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c)(1).

It is so ORDERED.

/s/Gunderson, C.J.
Gunderson

/s/Menoukian, J.
Menoukian

/s/Springer, J.
Springer

/s/Mowbray, J.
Mowbray

/s/Steffen, J.
Steffen

cc: Hon. Jospeh O. McDaniel,
District Judge
Messrs. Terry & Winter
Richard M. Moneymaker, Esq.
Messrs. Goicoechea & DeGrazia
Messrs. Wilson, Wilson & Barrows
Russell Piccoli, Esq.
R. L. Kane, Clerk

NO. 14762

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF NEVADA,
IN AND FOR THE COURT OF ELKO

WALLACE PERRY as Trustee of the estate of BOYD JAMES O"DONNELL and JOAN O'DONNELL, Bankrupts,

Plaintiff,

vs.

BOYD JAMES O'DONNELL, JOAN O'DONNELL, TEMORA TRADING COMPANY, LTD., a Bahamian corporation, MICHAEL W. MOGAN, BURTON BERGERON, EUGENE FOX, TED IVY, JAMES GLEASON, a fictitious person, NUOVO ANSTALT, a Liechtensteinian trust, and DOES I through 100, inclusive,

Defendants.

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FILED:
1981 JUL 13 PM 2:57
Clerk R.L. Kane
Deputy /s/

ORDER GRANTING PLAINTIFF'S MOTION TO DISMISS FOR FAILURE TO MAKE DISCOVERY, AND SUMMARY JUDGMENT

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff's Motion to Dismiss for Failure to Make Discovery and in the Alternative for Summary Judgment having come on regularly for hearing on May 12, 1981, the Court having examined the Affidavits and other documentation produced by the parties, considered the memoranda and oral argument of respective counsel and being fully advised in the matter, now makes Findings of Fact and Conclusions of law as follows:

## FINDINGS OF FACT

1. During the late 1960's the Bankrupt BOYD JAMES O'DONNELL (hereinafter called O'DONNELL) and JOAN O'DONNELL, his wife, acquired the subject real property situated in the County of Elko,

Nevada, and in the Counties of Los Angeles and San Bernardino in California, either individually or through other entities under the control of O'DONNELL.

2. Thereafter all of the subject propery was conveyed to JAMES GLEASON.

3. On March 13, 1970, the O'DONNELLS filed their Petition in Bankruptcy in the U.S. District Court for the District of Arizona. They alleged therein that they were insolvent and did not list the subject property as assets. JAMES GLEASON then conveyed the subject property to Defendant TEMORA TRADING COMPANY, LTD. (hereinafter called TEMORA), a Bahamian corporation. Stock was issued GLEASON, and then it was transferred to NUOVO ANSTALT, a Liechtenstein trust.

4. In 1972, O'DONNELL's Discharge in Bankruptcy was denied for making false

statements in the Bankruptcy proceedings.

5. The Trustee in Bankruptcy, WALLACE PERRY, in his investigation of the transfers of the subject property suspected that JAMES GLEASON was either a fictitious person or a "straw man," and that the aforesaid transactions were a fraudulent scheme whereby O'DONNELL would retain the control and benefit of the subject property free and clear of his creditors.

6. After many years of litigation in the Federal Bankruptcy Courts in Arizona and California, and the U.S. District Court in California, in which TEMORA's attorney, Richard M. Moneymaker, was successful in obtaining dismissals for lack of jurisdiction, the litigation ended up in this Court as a Quiet Title

action filed on September 1, 1977. Plaintiff was and is relying on certain "badges of fraud" in connection with the various conveyances to prove fraudulent conveyances.

7. Mr. Moneymaker, on behalf of his client TEMORA, has contended throughout that his client was a bona fide corporation with a Board of Directors and Stockholders, engaged in lawful business transactions. That the Plaintiff and his attorneys were engaged in a never-ending, malicious harassment of TEMORA.

8. Plaintiff served 120 Interrogatories on TEMORA on January 27, 1978. Partial Answers were filed on March 7, 1978. The Answers were not made by any officer or managing agent of the corporation, but by Mr. Moneymaker, as attorney-in-fact, pursuant to a General Power

of Attorney. Except for filing a copy of the Articles of Association and Memorandum of Association for TEMORA, and a description of the land and the names and addresses of the then Board of Directors, Mr. Moneymaker objected to all other questions on the grounds of relevance. This resulted in denying Plaintiff any discovery whatsoever. After a two-and-a-half year war of Motions, further Answers were filed, again by Mr. Moneymaker. Much of the delay was justified while a determination of the issue of whether JAMES GLEASON was a fictitious person, was res judicata resulting from Orders made in the Federal Courts in previous litigation. This problem even involved Appeals to the Ninth Circuit Court of Appeals.

9. Plaintiff's efforts to take the despositions in 1979 of the Board of Directors, Donald Aberle, A. F. Bowe and L. D. Burrows, were met with Motions for Protective Orders filed on behalf of TEMORA.

10. After the Fourth Amended Complaint was filed on May 18, 1980, and Defendant TEMORA filed its Answer, the aforementioned Answers to Interrogatories were filed on November 12, 1980, the Court having entered an Order to Compel Answers on September 9, 1980. These Answers did provide some information concering TEMORA's ownership and operations. The name and address of the person having custody of the stock book and corporate minute book was given as Mr. Donald Aberle, Nassau, Bahamas. That Dr. Kicher, Basil, Switzerland, had

possession of the financial statements. Also of interest was the statement that O"DONNELL was a joint signator with Mr. Moneymaker on a TEMORA bank account in Glendale, California; that O'DONNELL had operated and managed the Mediterranean Apartment Building for TEMORA since 1976, after the building had been acquired by TEMORA on a foreclosure sale, and he later sold the building for TEMORA. The Answers pointed the way for further discovery on the part of the Plaintiff.

11. In the meantime, Plaintiff's attorney, Russell Piccoli, investigated information that O'DONNELL was doing business as TEMORA TRADING COMPANY. He traveled to Los Angeles in April of 1979 and interviewed Arthur Silberman and

Geoffrey Miller. Mr. Miller's Deposition was later taken on June 5, 1979. He testified that O'DONNELL was operating a diesel fuel business under the name of TEMORA TRADING COMPANY, and represented that it was O'DONNELL's company.

12. Mr. Piccoli then flew to Switzerland to interview the two Swiss directors of TEMORA and the Trustee of NUOVO ANSTALT. He found that Dr. Kicher was really Dr. Iur. Walter H. Keicher who resides in Vaduz, Liechtenstein. He had formed the NUOVO ANSTALT Trust and had received instructions from O'DONNELL. When he was pressed for documents, Dr. Keicher suggested that Mr. Piccoli obtain Letters Rogatory from the Court, addressed to him, and he would then answer the questions.

Letters Rogatory were obtained, addressed to Dr. Keicher and also to Dr. H. U. Stucki. TEMORA, by and through its attorney, Mr. Moneymaker, submitted Cross Interrogatories. They consisted of two questions which in effect told Dr. Keicher and Dr. Stucki to clam up and don't tell them anything. They didn't respond.

13. Mr. Moneymaker was noticed for a Deposition personally. He claimed an attorney-client privilege.

14. In February of 1981, after prior interviews by Mr. Piccoli, Ralph David Seligman, the Bahamian attorney who was involved in forming TEMORA, gave an Affidavit. This was the first real, direct evidence to support Plaintiff's allegations. Mr. Seligman also appeared for a Deposition in the American Embassy

at Nassau, Bahamas, on April 2, 1981. After several questions by Mr. Piccoli, Mr. Moneymaker asked to be permitted to question the witness on voir dire. The questions indicated that Mr. Seligman should refuse to answer any questions and take advantage of the Bahamian privilege of non-disclosure, or to claim an attorney-client privilege. Mr. Seligman was not so inclined. Seligman then testified that TEMORA was formed as a "shelf corporation" by him and his former associate, Sir Guy Henderson, in 1969. This means that the corporation was formed, using Sir Guy and office personnel as the Board of Directors, each of whom was issued one share of stock. The corporation was then dormant (on a shelf) until someone wished to purchase it. He testified that TEMORA

was purchased by O'DONNELL, reportedly for JAMES GLEASON, on August 12, 1971. The deeds from GLEASON to TEMORA were dated in July, 1971. Mr. Seligman at no time ever met JAMES GLEASON. His only contact was with MR. O'DONNELL, Max Fink, a Los Angeles attorney, and Dr. Keicher of the NUOVO ANSTALT Trust. By 1979 he was convinced that he was being "used" by MR. O'DONNELL in a fraudulent scheme and requested that the affairs of TEMORA be assigned to someone else. Sir Guy Henderson also gave an Affidavit wherein he stated he had never met JAMES GLEASON.

15. During the first part of 1981, Plaintiff really got lucky. Apparently in December of 1980, O'DONNELL began having marital problems with his present wife, Irene Blank O'Donnell. She

contacted Attorney Eugene L. Wolver, Jr., of Los Angeles, in regard to a divorce. O'DONNELL had left certain records in her home when they separated. She turned these records over to Wolver. He turned them over to Walter Goodwin, one of O'DONNELL's creditors, who then turned them over to Mr. Piccoli. Further records between O'DONNELL and TEMORA were found in the files of Blanc Investment Compmany, owned by Irene Blanc O'Donnell, and turned over to Mr. Piccoli. Mr. Piccoli then filed the papers with the Court. The correspondence between O'DONNELL and Donald Aberle, President of TEMORA, established a very close relationship, although O'DONNELL was still playing his little game that JAMES GLEASON had some right, title or interest in TEMORA and the

trusts holding the stock; that O'DONNELL had paid fees for TEMORA, in direct contradition of Moneymaker's Answers to Interrogatories; that O'DONNELL arranged to be appointed "investment advisor" for TEMORA in May of 1976; arranged to have a new trust set up in Guernsey Channel Islands, to replace NUOVO ANSTALT; that there was a close relationship between O'DONNELL, TEMORA and Attorney Moneymaker during this period of time.

16. TEMORA's Directors, Aberle, Bowe and Burrows, were properly noticed for Depositions the first part of April, 1981, in the American Embassy, Bahamas. With all of the information and documents in the possession of Mr. Piccoli at that time, the Deposition of Mr. Aberle could have been very interesting had he appeared. He did not appear, nor

did the other two officers. Instead, they sent an attorney to claim their privilege under the Bahamian law, even though Mr. Moneymaker, with tongue in cheek, pleaded with their attorney to have them appear. The Court finds that said failure to appear was willful and deliberate and in direct violation of this Court's Order.

## CONCLUSIONS OF LAW

1. This Court acquired in rem jurisdiction of this action due to the fact that part of the real property is situated in the County of Elko, State of Nevada. That TEMORA, by and through its attorney, Richard Moneymaker, made a general appearance and the Court acquired personal jurisdiction to enter any and all Orders pertaining to the

California real property. That all other Defendants have failed to answer or otherwise plead after having been duly served with process, either personally or by publication, and default is hereby entered against BOYD JAMES O'DONNELL, JOAN O'DONNELL, JAMES GLEASON and NUOVO ANSTALT.

2. A debtor who wishes to conceal his assets from his creditors can acquire a Bahamian corporation and transfer his assets to said corporation through either a fictitious person or straw man. The board of directors of said corporation are nothing more than puppets. The stock is then issued to a Liechtenstein trust. The trustee then becomes a member of the board of directors. The debtor then controls the corporation and its assets through the

trustee. Both countries have laws that permit and, in fact, guarantee a veil of secrecy surrounding the ownership of these entities, and it is next to impossible for a creditor or any other third person to obtain any information as to the true beneficiary of the trust. One drawback of this scheme is that this Court considers that any debtor who goes to this much trouble really, really has something to hide. The person who has something to hide in this case is none other than BOYD JAMES O'DONNELL. Such a scheme in and of itself is a paramount "badge of fraud." Another pitfall is when the assets are real property situate in the U.S.A. and there is litigation as to the ownership and title. When the Bahamian corporation makes a

general appearnace to protect its interest in the real property, it submits to the jurisdiction of the Court in the United States where the land is located. When the Board of Directors are noticed for Depositions, they are subjected to the laws of the Court in which the suit is pending, and cannot then attempt to hide behind the secrecy laws of the Bahamas. If they do, sanctions can and will be imposed, pursuant to NRCP 37(d).

3. TEMORA's Board of Directors willfully and deliberately and in defiance of this Court's Order, refused to appear for their Depositions. Such contempt calls for the maximum sanctions provided, pursuant to NRCP 37(d).

4. TEMORA's attorney, Richard M. Moneymaker, has deliberately blocked and delayed Plaintiff's efforts to make

discovery. That as TEMORA's attorney-in-fact he has given false information in answering Interrogatories in respect to O'DONNELL's association and connection with TEMORA.

5. That for the willful and deliberate refusal to make discovery, the Defendants' Answer should be stricken and Summary Judgment entered for the Plaintiff and against the Defendants on Plaintiff's Third and Sixth Causes of Action in the Fourth Amended Complaint. **Skeen v. Valley Bank of Nevada**, 89 Nev. 301, 511 P.2d 1053 (Nev. 1973). The conveyances from O'DONNELL or his entities to JAMES GLEASON were fraudulent conveyances, and the title to all of the subject property vested in the Plaintiff Trustee in Bankruptcy upon the filing of the Petition in Bankruptcy on March 13,

1970, as provided by Sec. 70 of the Bankruptcy Act as Amended to 1968 (11 U.S.C. 110).

6. In further support of Summary Judgment, TEMORA's Board of Director's refusal to make discovery raises a presumption that, had they appeared for their Depositions, the evidence presented would have supported the allegation of the Plaintiff's Third and Sixth Causes of Action. See NRS 47.250(3).

7. Badges of fraud are recognized as proof of a fraudulent conveyance. Leonardo v. Leonardo, 251 F.2d 22 (D.C. Cir. 1958), Smith v. Popham, 266 Ore. 625, 513 P.2d 1172 (1973), First National Bank of Omaha v. First Cadco Corporation, 189 Neb. 743, 205 N.W.2d 115 (1973), and Payne v. Gilmore, 382 P.2d 140 (Okla. 1963). Hibernia Bank v. La.

**Ave. Realty Co.**, 79 S. 554 (La. 1918); **Estate of Cleo B. Reed v. Butcher**, 566 P.2d 587 (Wyo. 1977); **U.S. v. Leggett**, 292 F.2d 423 (6th Circuit) states the general rule at pages 426-247:

> The issue of fraud is commonly determined by certain recognized indicia, denominated "badges of fraud," which are circumstances so frequently attending fraudulent transfers than an inference of fraud arises from them. **Pergrem v. Smith, Ky., supra**, 255 S.W.2d 42, 44; **Leonardo v. Leonardo**, 251 F.2d 22, 27; **Bentley v. Caille**, 289 Mich. 74, 78, 286 N.W. 163, 164. Inadequacy of consideration, secret or hurried transactions not in the usual mode of doing business, and the use of dummies or fictitious parties are common examples of "badges of fraud." As said in the Bentley case, supra: "No effort to hinder or delay creditors is more severely condemned by the law than an attempt by a debtor to place his property where he can still enjoy it and at the same time require his creditors to remain unsatisfied." Although "badges of fraud" are not conclusive and are more or less strong or weak according to their nature and the

number occurring in the same case, "a concurrence of several badges will always make out a strong case."

8. Plaintiff should recover his costs of suit.

DATED this 13th day of July, 1981.

/s/ Jos. O. McDaniel
DISTRICT JUDGE

No. 14762

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF ELKO

WALLACE PERRY as Trustee of the Estates of BOYD JAMES O'DONNELL and JOAN O'DONNELL, Bankrupts,

Plaintiff,

vs.

BOYD JAMES O'DONNELL, JOAN O'DONNELL, TEMORA TRADING COMPANY, LTD., a Bahamian corporation, MICHAEL W. MOGAN, BURTON BERGERON, EUGENE FOX, TED IVY, JAMES GLEASON, a fictitious person, NUOVO ANSTALT, a Liechtensteinian trust, and DOES I through 100, inclusive,

Defendants.

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F I L E D:
1981 JUL 13 PM 2:50
Clerk R.L. Kane
/s/ Deputy

DECREE QUIETING TITLE
AND JUDGMENT

Plaintiff's Motion to Dismiss for Failure to Make Discovery and in the

Alternative for Summary Judgment having come on for hearing May 12, 1981, and the Court after examining the affidavits and other documentation produced by the parties and considering the memoranda and oral arguments of counsel, and the Court having filed its Findings of Fact and Conclusions of Law;

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff is the owner in fee simple and entitled to the possession of certain real property situated in the County of Elko, State of Nevada, described in Exhibit A attached hereto. Together with the funds received from MICHAEL W. MOGAN, BURTON BERGERON, EUGENE FOX AND TED IVY (purchasers in good faith under Contracts with O'DONNELL).

2. The claims of Defendants BOYD JAMES O'DONNELL, JOAN O'DONNELL, NUOVO ANSTALT, JAMES GLEASON, and TEMORA TRADING COMPANY, its officers, directors, agents, attorneys at law and attorney-in-fact, and all who may claim title under them as to said real property are without any right whatever, and said persons and corporation have no estate, right, title, lien, or interest whatever in or to said real property or any part thereof, or said funds, and are all permanently enjoined from claiming or asserting any estate, right, title, lien, or interest in or to said real property of funds or any part thereof;

3. Defendant TEMORA TRADING COMPANY and Richard M. Moneymaker, as attorney-in-fact, their officers, agents, representatives, employees, attorneys, and

all other persons in active concert and participation with them are hereby ordered to execute a Deed to Plaintiff, with thirty (30) days, to the following real properties in the State of California:

(a) Lot 60 in Tract 21360, in the County of Los Angeles, State of California, as per map recorded in Book 587, Pages 59 to 63 of Maps, in the office of the County Recorder of said County, commonly known as 1065 North Hillcrest Road, Beverly Hills, California.

(b) The easterly 82.5 feet of the westerly 165 feet of Lot 511 of Tract 1000, in the County of Los Angeles, State of California, as per map recorded in Book 19, Pages 1 to 34, inclusive, of Maps in the office of the

Recorder of said County, except the South 250 feet thereof, commonly known as the R-4 Lot on Sherman Way, Van Nuys, California.

(c) 57 Arcola Avenue, North Hollywood, being Lot 1 of Tract No. 11,650 as per map recorded in Book 2420 Page 25 in official records of said County Recorder of Los Angeles County.

(d) Lot 253 of Tract 323 as per map recorded in Book 14, Page 85 of maps in the office of the County Recorder of Los Angeles County.

(e) That certain real property situate in the County of San Bernardino, State of California, subject to various contracts of sale, commonly known as the "Hesperia Lands" described as: Tract 4725, Lots 213 and 231, as per map recorded in Book 59, Pages 72-75,

inclusive of Maps; Tract 4840, Lots 673, 2, 502, and 629, as per map recorded in Book 61, Pages 57-59 of Maps; Tract 4724, Lots 177 and 138, as per map recorded in Book 60, Pages 58-62 of Maps; Tract 4725, Lot 37, as per map recorded in Book 59, Pages 72-75, inclusive of Maps, all in the office of the County Recorder of San Bernardino County, California.

4. In the event of the properties listed in paragraph 3 have been sold, Defendant TEMORA TRADING COMPANY and Richard M. Moneymaker, as attorney-in-fact, their officers, agents, representatives, employees, attorneys and all persons in active concert and participation with them are hereby ordered to pay over to the Plaintiff any and all proceeds received from said sale or sales,

as well as any documentation pertaining to said sale, all within thirty (30) days from the date hereof.

5. The Court hereby specifically reserves jurisdiction to enter all necessary additional orders to effect the enforcement of the above Judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff recover his costs of suit.

ISSUED at Elko, Nevada, July 13, 1981.

/s/Jos. O. McDaniel
DISTRICT JUDGE

CERTIFICATE OF MAILING

The undersigned employee of the Fourth Judicial District Court hereby certifies that on the 13th day of July, 1981, one copy of the foregoing Decree Quieting Title and Judgment, and one

copy of Order Granting Plaintiff's Motion to Dismiss for Failure to Make Discover, and Summary Judgment were mailed to each of the following-named attorneys:

1. Richard M. Moneymaker, Esq., Moneymaker & Morrison, 700 S. Flower Street, Suite 1702, Los Angeles, California 90017
2. Richard G. Barrows, Esq., Wilson, Wilson & Barrows, Ltd., P. O. Box 389, Elko, Nevada 89801
3. Russell Piccoli, Esq., Goldstein & Kingsley, 1110 E. McDowell Road, Phoenix, Arizona 85006
4. Robert B. Goicoechea, Esq., Goicoechea, DiGrazia & Marvel, P. O. Box 1358, Elko, Nevada 89801

/s/Beryl L. Jenkins
Beryl L. Jenkins

**EXHIBIT A**

The following real property situate in the County of Elko, State of Nevada:

TOWNSHIP 36 NORTH, RANGE 58 EAST, M.D.B.&M.
Section7: N 1/2 SE 1/4
Section 29: NE 1/4 NW 1/4

TOWNSHIP 37 NORTH, RANGE 58 EAST, M.D.B.&M.
Section 11: SW 1/4 SE 1/4; NW 1/4 SE 1/4
Section 25: SW 1/4
Section 35: NE 1/4

TOWNSHIP 38 NORTH, RANGE 58 EAST, M.D.B.&M.
Section 25: NW 1/4 SW 1/4

TOWNSHIP 37 NORTH, RANGE 59 EAST, M.D.B.&M.
Section 17: SE 1/4

TOWNSHIP 37 NORTH, RANGE 59 EAST, M.D.B.&M.
Section 31: NE 1/4; W 1/2 SE 1/4; W 1/2 E1/2 SE 1/4

TOWNSHIP 38 NORTH, RANGE 59 EAST, M.D.B.&M.
Section 29: N 1/2 NW 1/4 SE 1/4; SW 1/4

TOWNSHIP 35 NORTH, RANGE 57 EAST, M.D.B.&M.
Section 1: N 1/2 SE 1/4

D O  N O T  P U B L I S H

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

**IN THE MATTER OF**
**BOYD O'DONNELL**
**and**
**JOAN O'DONNELL**, Bankrupts.

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**TEMORA TRADING CO.**,
Plaintiff-Appellant,
vs.
**WALLACE PERRY**, Trustee.

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NO. 76-1837

F I L E D
JAN 26, 1979
Emil E. Melfi, Jr. Clerk
U.S. Court of Appeals

**MEMORANDUM**

Appeal from the United States
District Court for the Central
District of California

Before: ELY and TRASK, Circuit Judges, and FITZGERALD, * District Judge.

Upon the filing of voluntary petitions for bankruptcy in Arizona, bankruptcy proceedings were commenced against Boyd and Joan O'Donnell, and pursuant thereto, a trustee, Wallace Perry, was duly appointed. Thereafter the trustee, learning of properties previously owned by the bankrupts and located in Southern California and Nevada, instituted ancillary proceedings in the District Court for the Central District of California. The trustee contended in those ancillary proceedings that the disposition of the properties to various persons, including one James

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* Honorable James M. Fitzgerald, United States District Judge, District of Alaska, sitting by designation.

Gleason, constituted a fraud upon the bankrupts' creditors and accordingly, the trustee sought and secured personal injunctions against further disposition of the properties by the transferees. However, prior to the issuance of these injunctions, Mr. Gleason had transferred all his interests in the subject properties to Temora Trading Co., a Bahamian corporation, in return for a beneficial interest in the shares of Temora. Three years after issuance of the requested injunctions appellant, Gleason's successor-in-interest, brought this collateral proceeding in the bankruptcy court for the Central District of California, seeking to set aside the Gleason injunctions as void for want of jurisdiction over the person. The bankruptcy judge refused to vacate the injunctions and

the district court affirmed without opinion. The sole issue we address here relates to the validity of those injunctions.

Our appellate jurisdiction is conferred by 28 U.S.C. §1292(a)(1), an appeal from an order of the district court refusing to dissolve an injunction.

Although the trustee failed to file a brief, he sent a brief communication to the clerk of court suggesting that the appeal was moot on the ground that Temora had succeeded in disposing of the properties despite the existence of the injunctions. However, at oral argument the issue of mootness was conceded to be without merit. This compels us to address the issue in this case: whether the bankruptcy court in the ancillary

proceedings had personal jurisdiction to issue the injunctions against Gleason.

The issue of lack of jurisdiction over the person was not raised before the original bankruptcy judge prior to issuance of the injunctions, presumably because Gleason never made an appearance before the court, personally or otherwise. The basis for the ancillary proceeding, as alleged by the trustee, was that Gleason was an alter ego of the bankrupts and that signatures of Gleason's name were actually executed by the bankrupts. At the time, although urging the "alter ego" theory, the trustee did not go so far as to allege that Gleason was a fictitious person. Instead, the trustee sought personal service of the moving papers on Gleason.

Appellant Temora Trading Co., having acquired title from Gleason prior to the issuance of the injunctions, challenged the validity of the injunctions in collateral proceedings brought in the Central District of California. [1] This was

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1/ It is clear from all the authorities that a collateral attack may be brought by any party, at any time, against a judgment void for want of subject matter jurisdiction or of jurisdiction over the person. Due to its jurisdictional nature such an attack is always timely and must be ruled upon by the court. See **Bookout v. Beck**, 354 F.2d 823, 825 (9th Cir. 1965). See also **Hanley v. Four Corners Vacation Prop., Inc.**, 480 F.2d 536, 538 (10th Cir. 1973); **Berry v. Allen**, 411 F.2d 1142, 1146 (6th Cir. 1969); **Davis v. St. Paul-Mercury Indemnity Co.**, 294 F.2d 641, 643 (4th Cir. 1961); **United States v. Sotis**, 131 F.2d 783, 787 (7th Cir. 1942); **United States v. Milana**, 148 F.Supp. 152, 154 (E.D. Mich. 1957). Accordingly, the referee's ruling that Rule 60(b) barred appellant's complaint was error. See **Bookout**, supra, at 825. See also **Comprehensive Merchandising Catalogs, Inc. v. Madison Sales Corp.**, 521 F.2d 1210, 1211 n. 1 (7th Cir. 1975); **Graciette v. Star Guidance, Inc.**, 66 F.R.D (continued)

the first time the jurisdictional issue was raised. At that time the trustee conceded in the pre-trial order that service had been improper, but, somewhat inconsistently from his original position in the ancillary proceeding, argued that Gleason was a fictitious person and that appellant had acquired its title through fraud. In the proceedings that followed, testimony offered by Temora Trading Co. showing that Gleason, in fact, did exist. The bankruptcy judge accordingly found Gleason was not a fictitious person. Nevertheless, on

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424, 426 (S.D.N.Y. 1975); Fed. R. Civ. Proc. 60(b), cl. 4; J. Moore, 7 Federal Practice, ¶60.25 [1] and 2 Federal Practice, ¶4.02[3], at 4-46 (2d ed. 1973); Wright and Miller, 11 Federal Practice and Procedure, §2862 at 197, 200 (1973).

other grounds, judgment was entered against Temora. 2/

Appellant Temora Trading subsequently appealed to the district court. At that time, the trustee shifted ground, contending service had been perfected by way of substituted service. It thus appears that the trustee is now prepared to concede the existence of Gleason. The district judge denied the appeal without opinion.

The following facts, elicited in the bankruptcy court below, reveal the basis

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2/ See note 1, supra. Despite the evidence that Gleason indeed existed (thus calling into question the adequacy of service), the bankruptcy judge concluded that plaintiff lacked standing below to contest the injunctions. We find that inasmuch, as the injunctions against its predecessor-in-interest clouded appellant's title to the subject properties, appellant had sufficient standing to contest their validity on jurisdictional grounds.

upon which we conclude that there was no perfected service of process on Gleason. The evidence squarely established while one Opal DeShong had been personally served (or served by mail) with the injunction papers intended for Gleason, Ms. DeShong had never been authorized by Gleason to receive service of process. Since Gleason himself was never served, we conclude that compliance with the service requirements of Rule 4(d)(1) of the Federal Rules of Civil Procedure was never accomplished.

Nor does the evidence reveal that substituted service was made under the terms of Rule 4(d)(7). That subsection permits service to proceed in the "manner prescribed by the law of the state" in which the district court sits. Although California Code of Civil

Procedure §415.20 allows for substituted service, such service is limited to delivery of copies to specific locations, including the person's "usual place of business." While the testimony revealed that Ms. DeShong had on at least one occasion met Gleason and notarized his signature on certain documents, the record is devoid of any support for the position that Wilden Realty (Ms. DeShong's place of employment) was Gleason's "usual place of business." Accordingly, we conclude that substituted service under the provisions of Rule 4(d)(7) was also never perfected. As a result, the personal injunctions issued by the ancillary bankruptcy proceedings in 1971 and 1972, having never been accompanied by acquisition of personal jurisdiction over Gleason through

personal appearance, service, waiver or otherwise, were improperly issued.

We conclude that the bankruptcy court never acquired jurisdiction over the person of James Gleason, a necessary prerequisite to issuance of any personal injunction enjoining his disposition of certain properties, and, accordingly, find that the injunctions were void ab initio. See cases cited in note 1, supra. The order below dismissing the appeal is reversed and the cause remanded with instructions to vacate the injunctions.

D O  N O T  P U B L I S H

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

**IN THE MATTER OF**
**BOYD O'DONNELL**
**and**
**JOAN O'DONNELL, Bankrupts.**

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**TEMORA TRADING CO.,**

Plaintiff-Appellant,

**vs.**

**WALLACE PERRY, Trustee.**

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NO. 76-1837
F I L E D
DEC 3 1979
Richard H. Deane
Clerk, U.S. Court of Appeals

**ORDER MODIFYING MEMORANDUM OF DECISION**

Appeal from the United States
District Court for the
Central District of California

D-12.

Before: ELY and TRASK, Circuit Judges, and FITZGERALD, * District Judge.

The third full sentence on page 3 of the Court's memorandum of decision of January 26, 1979 is modified to read:

> The Bankruptcy Court found it unnecessary to rule as to the existence of James Gleason and accordingly made no finding of fact in that regard.

This sentence replaces the sentence currently reading: "The bankruptcy judge accordingly refused to find that Gleason was a fictitious person."

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* Honorable James M. Fitzgerald, United States District Judge, District of Alaska, sitting by designation.

**No. 3 of 1980**

**An Act to amend the Banks and Trust Companies Regulation Act, 1965.**
**(Assented to: 24th March, 1980)**
**Commencement: 24th March, 1980)**

Enacted by the Parliament of The Bahamas.

1. This Act may be cited as the Banks and Trust Companies Regulation (Amendment) Act, 1980.

2. Section 10 of the Banks and Trust Companies Regulation Act, 1965 is repealed and the following section substituted --

> 10. -- (1) No person who has acquired information in his capacity as --
>
> (a) director, officer, employee or agent of any licensee or former licensee;
>
> (b) counsel and attorney, consultant or auditor of the Central Bank of The Bahamas, established under section 3 of the Central Bank of The Bahamas Act, 1974, or as an

employee or agent of such counsel and attorney, consultant or auditor;

(c) counsel and attorney, consultant, auditor, accountant, receiver or liquidator of any licensee or former licensee or as an employee or agent of such counsel and attorney, consultant, auditor, accountant, receiver or liquidator;

(d) auditor of any customer of any licensee or former licensee or as an employee or agent of such auditor;

(e) the Inspector under the provisions of this Act,

shall, without the express or implied consent of the customer concerned, disclose to any person any such information relating to the identity, assets, liabilities, transactions, accounts of a customer of a licensee or relating to any application by any person under the provisions of this Act, as the case may be, except --

(i) for the purpose of the performance of his duties or the exercise of his functions under this Act, if any; or

(ii) for the purpose of the performance of his duties within the scope of his employment; or

(iii) when a licensee is lawfully required to make disclosure by any court of competent jurisdiction within The Bahamas, or under the provisions of any law of The Bahamas.

(2) Nothing contained in this section shall --

(a) prejudice or derogate from the rights and duties subsisting at common law between a licensee and its customer; or

(b) prevent a licensee from providing upon a legitimate business request in the normal course of business a general credit rating with respect to a customer.

(3) Every person who contravenes the provisions of subsection (1) of this section shall be guilty of an offence against this Act and shall be liable on summary conviction to a fine not exceeding fifteen thousand dollars or to a term of imprisonment not exceeding two years or to both such fine and imprisonment."

## PERTINENT STATUTES

Section 11(e) of the Federal Bankruptcy Act of 1938 (11 U.S.C. Sec. 29 (e)) provides:

> e. A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. Where, by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, or for presenting or filing any claim, proof of claim, proof of loss, demand, notice, or the like, or where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law, for taking any action, filing any claim or pleading, or doing any act, and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the

receiver or trustee of the bankrupt may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the bankrupt, within a period of sixty days subsequent to the date of adjudication or within such further period as may be permitted by the agreement or in the proceeding or by applicable Federal or State law as the case may be.

Section 70(a) of the Federal Bankruptcy Act of 1938 (11 U.S.C. Sec. 110(a)) provides:

**SECTION SEVENTY**
**(11 U.S.C. § 110)**

**§ 70. Title to Property.** a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located (1) documents relating to his property; (2) interests in

patents, patent rights, copyrights, and trade-marks, and in applications therefor: Provided, That in case the trustee, within thirty days after appointment and qualification, does not notify the applicant for a patent, copyright, or trademark of his election to prosecute the application to allowance or rejection, the bankrupt may apply to the court for an order revesting him with the title thereto, which petition shall be granted unless for cause shown by the trustee the court grants further time to the trustee for making such election; and such applicant may, in any event, at any time petition the court to be revested with such title in case the trustee shall fail to prosecute such application with reasonable diligence; and the court, upon revesting the bankrupt with such title, shall direct the trustee to execute proper instruments of transfer to make the same effective in law and upon the records: (3) powers which he might have exercised for his own benefit, but not those which he might have exercised solely for some other person; (4) property transferred by him in fraud of his creditors; (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and

sold under judicial process against him, or otherwise seized, impounded, or sequestered: Provided, That rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process: And provided further, That when any bankrupt, who is a natural person, shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property; (7) contingent remainders, executory

devises and limitations, rights of entry for condition broken, rights or possibilities of reverter, and like interests in real property, which were nonassignable prior to bankruptcy and which, within six months thereafter, become assignable interests or estates or give rise to powers in the bankrupt to acquire assignable interests or estates; and (8) property held by an assignee for the benefit of creditors appointed under an assignment which constituted an act of bankruptcy, which property shall, for the purposes of this Act, be deemed to be held by the assignee as the agent of the bankrupt and shall be subject to the summary jurisdiction of the court.

All property, wherever located, except insofar as it is property which is held to be exempt, which vests in the bankrupt within six months after bankruptcy by bequest, devise or inheritance shall vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date when it vested in the bankrupt, and shall be free and discharged from any transfer made or suffered by the bankrupt after bankruptcy.

All property, wherever located, except insofar as it is

property which is held to be exempt, in which the bankrupt has at the date of bankruptcy an estate or interest by the entirety and which within six months after bankruptcy becomes transferable in whole or in part solely by the bankrupt shall, to the extent it becomes so transferable, vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date of bankruptcy.

The title of the trustee shall not be affected by the prior possession of a receiver or other officer an any court.